

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3                   SAN JOSE DIVISION

4                   EBAY, INC.,    ) CV-08-4052-JF  
5    )  
6                   PLAINTIFF,    ) SAN JOSE, CALIFORNIA  
7    )  
8                   VS.    )  
9    ) DECEMBER 12, 2008  
10                   DIGITAL POINT SOLUTIONS,                          )  
11                   INC. ET AL,    )  
12    ) PAGES 1-38  
13                   DEFENDANT.    )

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14                   TRANSCRIPT OF PROCEEDINGS  
15                   BEFORE THE HONORABLE JEREMY FOGEL  
16                   UNITED STATES DISTRICT JUDGE

17                   A P P E A R A N C E S:

18                   FOR THE PLAINTIFF: O'MELVENY & MYERS LLP  
19                   EBAY    BY: DAVID EBERHART  
20    SHARON BUNZEL  
21    TWO EMBARCADERO CTR, 28TH FL  
22    SAN FRANCISCO, CA 94111

23                   FOR THE DEFENDANT: COAST LAW GROUP, LLP  
24                   DIGITAL POINT    BY: ROSS CAMPBELL  
25                   SOLUTIONS, HOGAN                                      169 SAXONY RD, STE204  
  ENCINITAS, CA 92024

26                   ALSO PRESENT:    ADAM SAND

27    (APPEARANCES CONTINUED ON THE NEXT PAGE)

28                   OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR,  
29    CERTIFICATE NUMBER 13185

1 FOR THE DEFENDANT: RUS, MILIBAND & SMITH, APC  
2 BRIAN DUNNING, BY: LEO PRESIADO  
3 BRIANDUNNING.COM, 2211 MICHELSON DR., 7TH FL  
4 THUNDERWOOD IRVINE, CA 92612

5 FOR THE DEFENDANT: FREELAND COOPER & FOREMAN, LLP  
6 TODD DUNNING, BY: STEWART FOREMAN  
7 DUNNING ENTERPRISE 150 SPEAR ST., STE 1800  
8 SAN FRANCISCO, CA 94105

9 FOR THE DEFENDANT: LAW OFFICE OF PATRICK MCCLELLAN  
10 KESSLER'S FLYING BY: PATRICK MCCLELLAN  
11 CIRCUS 2211 MICHELSON DR., #700  
12 IRVINE, CA 92612

1 SAN JOSE, CALIFORNIA

DECEMBER 12, 2008

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: OKAY. WE HAVE ONE OTHER  
6 MATTER FOR ARGUMENT, AND THAT'S EBAY VERSUS DIGITAL  
7 POINT SOLUTION.

8 OKAY. COULD I GET APPEARANCES, PLEASE.

9 MR. EBERHART: GOOD MORNING, YOUR HONOR.  
10 DAVID EBERHART ON BEHALF OF EBAY, ALONG WITH MY  
11 PARTNER SHARON BUNZEL AND CLIENT REPRESENTATIVE  
12 ADAM SAND.

13 THE COURT: GOOD MORNING.

14 MR. PRESIADO: GOOD MORNING, YOUR HONOR.  
15 LEO PRESIADO ON BEHALF OF DEFENDANTS BRIAN DUNNING,  
16 BRIANDUNNING.COM, AND THUNDERWOOD HOLDINGS, INC.

17 THE COURT: OKAY. I'M SORRY, GO AHEAD.

18 MR. FOREMAN: GOOD MORNING, YOUR HONOR.  
19 STEWART FOREMAN ON BEHALF OF DEFENDANTS  
20 TODD DUNNING AND DUNNING ENTERPRISE, INC.

21 MR. MCCLELLAN: GOOD MORNING, YOUR HONOR.  
22 PATRICK MCCLELLAN ON BEHALF OF KESSLER'S FLYING  
23 CIRCUS.

24 MR. CAMPBELL: GOOD MORNING, YOUR HONOR.  
25 ROSS CAMPBELL --

1                   THE COURT: JUST A MOMENT.

2                   COUNSEL, IF YOU COULD DO THAT OUTSIDE,

3                   THANK YOU.

4                   MR. CAMPBELL: GOOD MORNING, YOUR HONOR.

5                   ROSS CAMPBELL ON BEHALF OF DEFENDANTS SHAWN HOGAN  
6                   AND DIGITAL POINT SOLUTIONS, INC.

7                   THE COURT: GOOD MORNING, EVERYONE.

8                   PLEASE, YOU COULD HAVE A SEAT IF YOU LIKE.

9                   I WILL BASICALLY CUT TO THE CHASE. I  
10                  DON'T THINK THAT THERE'S A PROBLEM WITH THIS  
11                  COMPLAINT. I THINK EBAY COULD HAVE, PERHAPS,  
12                  PROVIDED A LITTLE MORE SPECIFICITY WITH REGARD TO  
13                  DAMAGES, BUT I DON'T THINK IT'S REQUIRED TO.

14                  I THINK THE ISSUE IS WHETHER THE STATUTE,  
15                  THE CFAA, COVERS A THIRD-PARTY COMPUTER. THERE'S  
16                  CASE LAW THAT SUPPORTS EBAY ON THAT. I THINK  
17                  THERE'S A FACTUAL ISSUE AS TO WHETHER THE ACCESS  
18                  WAS AUTHORIZED OR NOT. THE AOL CASE TALKS ABOUT  
19                  VIOLATIONS OF USER AGREEMENTS BEING UNAUTHORIZED  
20                  ACCESS; THAT'S ALLEGED.

21                  THE -- WITH REGARD TO RICO, THE QUESTION  
22                  OF WHEN THERE WAS A CORPORATE ENTITY IN THE GRAND  
23                  SCHEME OF THINGS, THERE'S A FACTUAL ISSUE AS TO  
24                  THAT. I THINK THE RICO CLAIM, ALTHOUGH I'M NOT A  
25                  GREAT FAN OF RICO CLAIMS, AND I DON'T THINK ANY

1 TRIAL JUDGES ARE, BUT I THINK IN THIS ONE, THE  
2 ELEMENTS HAVE BEEN ADEQUATELY ASSERTED.

3 AND THEN WITH REGARD TO THE CASE  
4 MANAGEMENT QUESTIONS, THE FORUM SELECTION CAUSE IN  
5 THE PENDING CASE IN SOUTHERN CALIFORNIA, EBAY IS  
6 NOT A PARTY IN THOSE CASES. SO WHILE THERE MIGHT  
7 BE SOME EFFICIENCY IN THE COORDINATION -- AND I  
8 DON'T BELIEVE VENUE IN SOUTHERN CALIFORNIA IS  
9 REQUIRED OR THAT THE COURT OUGHT TO STAY THIS CASE  
10 JUST BECAUSE THERE'S SOMETHING GOING ON THERE.

11 SO THAT'S MY VIEW. LET ME ASK THE MOVING  
12 PARTIES IF THERE'S A PARTICULAR THING THEY WANT TO  
13 HIGHLIGHT BEYOND WHAT'S IN THE PAPERS, AND I WILL  
14 BE HAPPY TO TALK ABOUT YOU ABOUT IT IF YOU HAVE.

15 GO AHEAD.

16 MR. PRESIADO: YOUR HONOR, IN  
17 CONSIDERATION OF THE COURT'S TIME, AND BY WE I MEAN  
18 MYSELF AND MR. FOREMAN, HAVE SPLIT UP THE ARGUMENT  
19 MADE BY THE DUNNING DEFENDANTS AND ONLY DUNNING  
20 DEFENDANTS, WE ARE NOT AFFILIATED WITH THE HOGAN  
21 DEFENDANTS.

22 SO I WOULD LIKE TO DISCUSS THE VENUE IN  
23 PARTICULAR WHICH I SEE AS A THRESHOLD ISSUE, THE  
24 ISSUE OF THE FORUM SELECTION CLAUSE. IF THAT'S  
25 OKAY WITH THE COURT TO START.

1                   THE COURT: YOU CAN DO WHATEVER YOU LIKE.  
2                   HOW DOES -- HOW IS EBAY BOUND BY THAT  
3                   SINCE THEY ARE NOT A PARTY TO THAT PARTICULAR  
4                   AGREEMENT?

5                   MR. PRESIADO: WELL, YOUR HONOR, I DON'T  
6                   THINK IT CAN BE REASONABLY DISPUTED THAT THE  
7                   PARTIES ARE ONLY RELATED THROUGH THAT AGREEMENT.  
8                   THE ONLY REASON THAT EBAY WAS MAKING PAYMENTS TO  
9                   OUR CLIENTS, AND THOSE PAYMENTS THEY NOW  
10                  CHARACTERIZE AS THE DAMAGES THEY SUSTAINED, THE  
11                  ONLY REASON THEY WERE MAKING THOSE PAYMENTS WAS  
12                  BECAUSE OF OUR CLIENTS' PARTICIPATION IN THE EBAY  
13                  AFFILIATED PROGRAM THROUGH THAT PSA, THE PUBLISHED  
14                  SERVICE AGREEMENT.

15                  SO --

16                  THE COURT: SO YOU ARE SAYING EBAY  
17                  CONTRACTUALLY AGREED TO HAVE ANY DISPUTES OF THIS  
18                  KIND RESOLVED IN THE CENTRAL DISTRICT OF  
19                  CALIFORNIA; DID EBAY ACTUALLY AGREE TO THAT?

20                  MR. PRESIADO: WELL, EBAY DOESN'T HAVE TO  
21                  BE A SIGNATORY TO THAT AGREEMENT.

22                  THE COURT: THEY ARE A THIRD-PARTY  
23                  BENEFICIARY.

24                  MR. PRESIADO: BUT BEYOND THAT, IF YOU  
25                  LOOK AT THE CASE LAW PROVIDED, IT'S ACTUALLY THE

1 STANDARD THAT IS CLOSELY RELATED TO THAT AGREEMENT.  
2 THEY ARE A THIRD-PARTY BENEFICIARY, AND EVEN THAT  
3 SAYS FOR THEM TO BE BOUND BY THAT FORUM SELECTION  
4 CLAUSE, BUT THE STANDARD IS ACTUALLY LOWER THAN  
5 THAT, IT'S CLOSELY RELATED.

6 AND NOT ONLY THAT, IF YOU LOOK AT THE T&C  
7 SUPPLEMENT, THAT SUBSUMES -- AND THAT'S AN EBAY  
8 DOCUMENT, THAT'S NOT CONTESTED -- THAT SUBSUMES THE  
9 PSA. AND IN FACT, THERE'S LANGUAGE IN THAT STATING  
10 THAT SETTING UP AND ESTABLISHING THE AGENCY  
11 RELATIONSHIP BETWEEN EBAY AND COMMISSION JUNCTION,  
12 IT STATES THAT THE AFFILIATED PROGRAM IS MONITORED  
13 BY EBAY THROUGH COMMISSION JUNCTION BASED ON THE  
14 PSA.

15 THE COURT: ALL RIGHT.

16 SO IN OTHER WORDS, IF I CAN SAY BACK TO  
17 YOU WHAT I'M HEARING, TO THE EXTENT THAT EBAY IS  
18 CLAIMING THAT THEY HAVE A CLAIM UNDER THE CFAA  
19 BECAUSE THE TERMS AND CONDITIONS OF THE USER  
20 AGREEMENT PRECLUDED THE ACTIVITY THAT OCCURRED  
21 HERE. THOSE TERMS AND CONDITIONS SUBSUME THE  
22 AGREEMENT THAT CONTAINS THE FORUM SELECTION CLAUSE.

23 MR. PRESIADO: IT'S EVEN BROADER THAN  
24 THAT, YOUR HONOR, BECAUSE THE PSA HAS RELATED TO  
25 LANGUAGE BECAUSE, BASICALLY, ANY DISPUTE RELATED TO

1 THE PSA FALLS INTO THIS VENUE --

2 THE COURT: RIGHT. WELL THAT'S  
3 NECESSARILY A DISPUTE BETWEEN THE PARTIES TO THE  
4 PSA.

5 SO EBAY IS NOT A PARTY, BUT YOU ARE  
6 SAYING THEY ARE, NONETHELESS, BOUND BY IT BECAUSE  
7 THEY HAVE, IN EFFECT, INCORPORATED IT INTO THE  
8 TERMS AND CONDITIONS.

9 MR. PRESIADO: RIGHT.

10 AND THEY ARE CLOSELY RELATED AND THEY ARE  
11 THIRD-PARTY BENEFICIARY. BUT ARGUMENT CAN ALSO BE  
12 MADE THAT THEY ARE, IN FACT, PARTY TO THAT PSA  
13 BECAUSE OF THE AGENCY RELATIONSHIP WITH CJI,  
14 COMMISSION JUNCTION, AND THAT'S APPARENT FROM THE  
15 PLEADINGS THEMSELVES.

16 IF YOU LOOK AT PARAGRAPH -- THE EBAY  
17 COMPLAINT AT PARAGRAPH 19, TOP OF PAGE 5, THE LAST  
18 SENTENCE, "EBAY AND/OR COMMISSION JUNCTION TRACKS  
19 THE INFORMATION USING INFORMATION PLACED ON THE NEW  
20 USER'S BROWSER."

21 THAT'S THE WHOLE CRUX OF THE ARGUMENT.  
22 THE TRACKING IS DONE BY THE PLACING OF COOKIES.  
23 ALSO, IF YOU GO TO PARAGRAPH 12, THEY ALLEGED -- I'M  
24 SORRY, PARAGRAPH 20 OF THE FIRST AMENDED COMPLAINT.  
25 "EBAY USED THE SERVICES OF COMMISSION JUNCTION IN

1 ADMINISTERING THE AFFILIATED MARKETING PROGRAM."

2 THEY GO ON TO ALLEGE, "CJ WAS RESPONSIBLE FOR,

3 AMONG OTHER THINGS, RECRUITING AFFILIATES

4 TRACKING -- I'M SORRY -- "TRACKING AFFILIATE

5 TRAFFIC, MONITORING COMPLIANCE WITH AFFILIATES,

6 PREVENTING AND DETECTING FRAUDULENT ACTIVITY, AND

7 PAYING AFFILIATES USING FUNDS PERMITTED BY EBAY."

8 SO THESE ALLEGATIONS INFER THAT THERE WAS A DIRECT

9 AGENCY RELATIONSHIP BETWEEN THE TWO.

10 NOW, THE STANDARD WITH RESPECT TO VENUE

11 IS THAT THE BURDEN IS ON THE PLAINTIFF TO ESTABLISH

12 PROPER VENUE; AND ALSO, THE BURDEN IS ON THE

13 PLAINTIFF TO ESTABLISH OR TO DEFUSE THE PRESUMED

14 VALIDITY OF A FORUM SELECTION CLAUSE.

15 THE COURT: THE ARGUMENT HERE ISN'T THAT

16 THE FORUM SELECTION CLAUSE ISN'T VALID, THEY ARE

17 SAYING THEY ARE NOT A PART OF IT. I DON'T THINK

18 THEY ARE ATTACKING ITS VALIDITY.

19 MR. PRESIADO: NONETHELESS, IT IS THEIR  
20 BURDEN TO ESTABLISH PROPER VENUE.

21 THE COURT: IF THAT FORUM SELECTION

22 CLAUSE DIDN'T EXIST THIS WOULD NOT BE AN IMPROPER

23 VENUE. SO IT'S A DEFENSE, IF YOU WILL, TO THEIR

24 ASSERTION OF VENUE.

25 AND I AGREE THAT -- ASSUMING THEY WERE A

1 PARTY TO THAT CLAUSE, THEN IT WOULD BE THEIR BURDEN  
2 TO SHOW IT WASN'T VALID AND IT SHOULDN'T BE  
3 ENFORCED. BUT THE FIGHT IS ABOUT WHETHER THEY ARE  
4 A PARTY, NOT WHETHER IT'S VALID.

5 MR. PRESIADO: DEFENDANTS HAVE ASKED THE  
6 COURT TO TAKE JUDICIAL NOTICE OF THE COMMISSION  
7 JUNCTION COMPLAINT WHICH ATTACHES THE PSA. AND IN  
8 THAT -- AND I DON'T WANT TO REHASH ALL MY  
9 ARGUMENTS, BUT THERE IS -- THE VENUE SELECTION  
10 CLAUSE DOES APPLY TO EBAY, JUST TO SUMMARIZE,  
11 EITHER AS THE DIRECT AGENT --

12 THE COURT: I SEE WHAT YOU ARE GETTING  
13 AT. I'M GOING TO ASK THEM TO RESPOND.

14 THANK YOU.

15 MR. FOREMAN?

16 MR. FOREMAN: WOULD YOU LIKE ME TO  
17 ADDRESS THOSE OTHERS NOW?

18 THE COURT: NO, NO. ANYTHING ELSE YOU  
19 WANT TO ADD?

20 MR. FOREMAN: JUST AN ADDITIONAL BRIEF  
21 COMMENT ON VENUE.

22 EVEN ASIDE FROM THE AGREEMENT ARGUMENT,  
23 THE ONLY THING THAT OCCURS IN THIS DISTRICT IS  
24 EBAY'S HEADQUARTERS. COMMISSION JUNCTION IS IN THE  
25 CENTRAL JUNCTION. EBAY PAYS COMMISSION JUNCTION IN

1 THE CENTRAL DISTRICT WHICH THEN PAYS OUR CLIENTS  
2 WHICH ARE IN THE CENTRAL DISTRICT --

3 THE COURT: THAT'S A 1404 ARGUMENT.

4 MR. FOREMAN: WHAT I PRIMARILY WANTED TO  
5 ADDRESS, YOUR HONOR, IS THE SUBSTANTIVE POINT ABOUT  
6 THE CFAA AND SECTION 502 CLAIMS.

7 AND WITH ALL DUE RESPECT TO THE COURT,  
8 YOUR INITIAL COMMENT REFERENCED THE USER AGREEMENT  
9 IN THE AOL CASE. AND I'M NOT EXACTLY -- I'M JUST  
10 INFERRING WHAT YOU MIGHT MEAN BY THAT REFERENCE,  
11 BUT I THINK IT'S IMPORTANT TO UNDERSTAND THAT THIS  
12 CASE IS NOT ABOUT THE USER AGREEMENT. THE USER  
13 AGREEMENT IS ONLY ALLEGED IN THIS FIRST AMENDED  
14 COMPLAINT IN ORDER TO CREATE THE ALLEGED VENUE  
15 HERE.

16 THE USER AGREEMENT, WHICH BY THE WAY THE  
17 PLAINTIFFS DON'T ATTACH TO THEIR COMPLAINT BUT  
18 AGAIN WE ASKED FOR JUDICIAL NOTICE, WE PRINTED OFF  
19 A COPY, THAT'S THE AGREEMENT THAT EVERY ONE OF US  
20 IN THIS COURTROOM WHO HAPPENS TO BE REGISTERED AS  
21 EBAY POTENTIAL BUYERS SIGN AS BUYERS.

22 THE COURT: THEY OFFERED THAT -- THEY ARE  
23 NOT TRYING TO ENFORCE THE USER AGREEMENT AS A  
24 CONTRACT.

25 YOU ARGUE THAT THEY HAVEN'T MET THE

1 ELEMENT OF UNAUTHORIZED ACCESS, AND THEY ARE SAYING  
2 IT VIOLATES THE USER AGREEMENT TO STUFF COOKIES;  
3 THAT'S THEIR ARGUMENT.

4 MR. FOREMAN: WELL, WITH ALL DUE RESPECT,  
5 YOUR HONOR, THE SUBSTANTIVE ALLEGATIONS IN THE  
6 FIRST AMENDED COMPLAINT, AT LEAST AS I READ THEM,  
7 DON'T TALK ABOUT US VIOLATING THE USER AGREEMENT.  
8 THEY TALK ABOUT US VIOLATING THE AFFILIATE  
9 MARKETING PROGRAM WHICH IS NOT PART OF THE USER  
10 AGREEMENT.

11 AND THE ALLEGATIONS ABOUT THE COOKIE  
12 STUFFING PROGRAM HAVE TO DO WITH A PROGRAM THAT IS  
13 COMPLETELY SEPARATE FROM BEING A USER OF EBAY IN  
14 THE SENSE OF GOING ON THEIR TO PURCHASE THINGS.

15 IT'S THE BEHIND THE -- WHAT WE WERE  
16 ENGAGED IN AS AFFILIATES TO THEIR MARKETING PROGRAM  
17 THROUGH COMMISSION JUNCTION IS THE BEHIND THE  
18 SCENES ACTIVITY TO TRY TO GET PEOPLE AS USERS OF  
19 EBAY.

20 SO WHAT I'M TRYING TO POINT OUT, YOUR  
21 HONOR, IS THAT THE COOKIE STUFFING IS UNRELATED TO  
22 THE USER AGREEMENT. IF THE ACCESS ISSUE FOR THE  
23 CFAA IN 502 HAS TO BE LOOKED AT IN THE CONTEXT OF  
24 THE ACTIVITY THAT THE PARTY WAS ALLEGEDLY ENGAGED  
25 IN, WHICH IS THE AFFILIATE MARKETING PROGRAM, AS

1           THEY CLAIM IN THE FIRST AMENDED COMPLAINT.

2           AND UNDER THAT PROGRAM, THEY ADMIT -- AND  
3           FIRST OF ALL, THEY ADMIT IN THEIR FIRST AMENDED  
4           COMPLAINT THAT OUR CLIENTS NEVER ACCESSED THEIR  
5           COMPUTERS AS AFFILIATES. THAT JUST DOESN'T HAPPEN;  
6           SO THAT'S NOT EVEN A DISPUTE.

7           THE ONLY THING THEY SAY, AND THEY RAISE  
8           THIS NOT IN THEIR PLEADINGS BUT AS AN ARGUMENT IN  
9           THEIR OPPOSITION BRIEF, WHICH THAT IN AND OF ITSELF  
10          REQUIRES AN AMENDMENT TO THE COMPLAINT, BUT WHAT  
11          THEY SAY IS, OH, THE POTENTIAL USER, THE INTERNET  
12          USER WAS AN UNWITTING AGENT FOR OUR CLIENTS UNDER  
13          THE AFFILIATE MARKETING PROGRAM, NOT UNDER THE USER  
14          AGREEMENT.

15          THE PROBLEM WITH THAT ARGUMENT, YOUR  
16          HONOR, IS THAT EVERY CASE THAT TALKS ABOUT A  
17          PRINCIPAL AGENCY RELATIONSHIP POTENTIALLY GIVING  
18          RISE TO A VIOLATION UNDER THE CFAA, IT'S CLEAR THAT  
19          THERE IS A CLEAR AGENCY PRINCIPAL RELATIONSHIP AND  
20          THAT RELATIONSHIP WAS FORMED FOR THE PURPOSE OF  
21          IMPROPER ACCESS.

22          THAT'S NOT WHAT OCCURS HERE AND THEY  
23          CERTAINLY DON'T ALLEGGE IT. HERE, YOU'VE GOT, BY  
24          THEIR OWN WORDS IN THEIR ARGUMENT, UNWITTING USERS  
25          WHO HAVE A COOKIE THAT THEN VOLUNTARILY GO TO EBAY.

1                   THEN THERE'S THE ISSUE OF THE  
2 UNAUTHORIZED PART. WELL, I THINK IT'S VERY CLEAR  
3 FROM THE ARGUMENT, AND AGAIN IT'S NOT EVEN ALLEGED  
4 IN THE COMPLAINT, BUT IN THE ARGUMENT THE  
5 UNAUTHORIZED ASPECT IS ONLY DETERMINED AFTER THE  
6 FACT. AND IT'S CLEAR UNDER THE CASES,  
7 SHAMROCK FOODS AND OTHERS, THAT YOU CAN ONLY HAVE  
8 UNAUTHORIZED ACCESS AT THE TIME OF THE ACCESS.

9                   THE SHAMROCK CASE AND OTHERS CLEARLY SAY  
10 IF YOU'VE GOT AUTHORIZED ACCESS AND YOU LATER USE  
11 THAT ACCESS FOR IMPROPER PURPOSE, THAT MAY BE A  
12 VIOLATION OF SOME THINGS BUT NOT CFAA.

13                  THE COURT: THAT'S WHERE I THINK, AND I  
14 WILL CERTAINLY LOOK AND MAKE SURE I'M NOT CONFUSING  
15 APPLES AND ORANGES, BUT I THINK THAT'S WHERE THE  
16 USER AGREEMENT IS RELEVANT BECAUSE IT'S NEVER  
17 AUTHORIZED TO ACCESS THE COMPUTERS FOR AN IMPROPER  
18 PURPOSE. IT'S NOT AUTHORIZED TO THEM TO USE THEM  
19 FOR A COOKIE STUFFING SCHEME, FOR EXAMPLE.

20                  THAT'S WHAT I UNDERSTOOD THEM TO BE  
21 ARGUING WAS THAT IT IS UNAUTHORIZED AT THE TIME  
22 THAT IT OCCURS BECAUSE USERS AREN'T ALLOWED TO DO  
23 THAT.

24                  MR. FOREMAN: WELL --

25                  THE COURT: OR USERS AREN'T ALLOWED TO BE

1 USING IT.

2 MR. FOREMAN: BUT WE'RE NOT THE USER.

3 THE COURT: BUT YOU ARE USING THE USERS,  
4 IS WHAT THEY ARE SAYING. AND THAT IS, IN ITSELF,  
5 UNAUTHORIZED ACCESS.

6 MR. FOREMAN: WELL, YOUR HONOR, IF I MAY  
7 JUST BACK UP SO THAT WE ARE, AT LEAST I AM  
8 SATISFIED ON BEHALF OF MY CLIENT THAT WE KIND OF  
9 UNDERSTAND WHAT THEY'VE ALLEGED IN TERMS OF FACTUAL  
10 SEQUENCE.

11 WE HAVE A PERSON OUT IN THE INTERNET, THE  
12 USER, WHO HAS ON THEIR SCREEN AT SOME POINT THROUGH  
13 SOME OTHER PLACE THEY'VE BEEN ON THE INTERNET,  
14 WINDS UP WITH AN ADD FOR EBAY THAT'S BEEN PUT THERE  
15 BY OUR CLIENTS.

16 AND IN THAT PROCESS OF VIEWING THAT AD,  
17 THAT USER WINDS UP WITH A KESSLER COOKIE ON THEIR  
18 COMPUTER. NOBODY SAYS THERE'S ANYTHING WRONG WITH  
19 THAT; THAT HAPPENS TO ALL OF US ALL THE TIME.

20 THEN THAT USER GOES TO EBAY, MAYBE IT'S  
21 JOE THE AUTO MECHANIC IN BALTIMORE, AND HE WANTS TO  
22 BUY NEW SHOCK ABSORBERS CHEAPER THAN HIS LOCAL  
23 DISTRIBUTOR. HE'S NEVER USED EBAY BEFORE; HE'S NOT  
24 YET EVEN SIGNED THE USER AGREEMENT. HE SURFS EBAY,  
25 BUT IN THE PROCESS HE HAS PICKED UP AN EBAY COOKIE

1 FROM EBAY.

2 LET'S SAY HE FINDS HIS SHOCK ABSORBERS  
3 THAT ARE CHEAPER AND HAS TO BUY THEM. HE THEN HAS  
4 TO REGISTER AND HE SIGNS A USER AGREEMENT AT THAT  
5 TIME. HE SIGNS IT; WE DON'T. HE SIGNS IT; HE BUYS  
6 SOMETHING.

7 THROUGH THE WONDERS OF THE INTERNET,  
8 COMMISSION JUNCTION DOWN IN THE CENTRAL DISTRICT,  
9 GETS A NOTICE SAYING THERE'S A MATCH; THAT'S A  
10 KESSLER'S COOKIE AND AN EBAY COOKIE; WE HAVE A NEW  
11 USER REGISTERED ON EBAY THAT'S BOUGHT SOMETHING,  
12 KESSLER IS OWED COMMISSION. THAT'S HOW THIS WORKS.

13 SO THE USER AGREEMENT THAT THEY'VE  
14 ALLEGED TO TRY TO CREATE THE, YOU KNOW,  
15 JURISDICTION HERE, IS THE USER AGREEMENT OF OUR  
16 INDIVIDUAL CLIENTS WHICH HAS NOTHING TO DO WITH THE  
17 TRANSACTION THAT I JUST DESCRIBED WITH OUR JOE, THE  
18 AUTO SHOP.

19 SO THAT'S WHY IT HAS NOTHING TO DO WITH  
20 CFAA. AND WHAT I JUST DESCRIBED, AND I DON'T THINK  
21 ANYBODY SERIOUSLY DISPUTES THESE FACTS, THE USER  
22 AGREEMENT THAT JOE SIGNS CAN'T CREATE LIABILITY FOR  
23 US UNDER THE CFAA.

24 WHAT THEY ALLEGE IS THAT JOE, WHEN HE  
25 ORIGINALLY SAW OUR AD, HE DIDN'T CLICK ON SOMETHING

1 TO GET HIS COOKIE. THAT'S THEIR PROBLEM. THAT'S  
2 WHAT THEY'RE FUNDAMENTALLY COMPLAINING ABOUT, THAT  
3 HE GOT A COOKIE SOMEHOW.

4 THEY SAY HE WAS SUPPOSED TO CLICK ON  
5 SOMETHING. AND THEY SAY SOME PEOPLE DID, WHICH  
6 PRESUMABLY IS OKAY, AND SOME PEOPLE DIDN'T, WHICH  
7 THEY COMPLAIN ABOUT. BUT THEY DON'T EVEN ALLEGE  
8 HOW TO DISTINGUISH WHETHER JOE CLICKED OR DIDN'T  
9 CLICK WHEN HE GOT HIS COOKIE.

10 WHAT THEY SAY IS IF HE'S AN UNCLICKED  
11 PERSON, HE'S THEN AN INVOLUNTARY AGENT OF OUR  
12 CLIENTS AND THAT AFTER HE BUYS SOMETHING AND AFTER  
13 THEY PAY A COMMISSION TO COMMISSION JUNCTION THAT  
14 EVENTUALLY COMES TO US, HE RETROACTIVELY BECOMES  
15 UNAUTHORIZED TO HAVE ACCESSED EBAY'S COMPUTER.

16 THE COURT: WELL, BUT HE'S CARRYING --  
17 AND THIS IS GOING TO BE A BAD ANALOGY, BUT HE'S  
18 CARRYING THE BUG OR VIRUS AT THE TIME HE REGISTERS;  
19 THE COOKIE IS ALREADY THERE.

20 MR. FOREMAN: AGREED.

21 THE COURT: SO --

22 MR. FOREMAN: I'M SORRY, YOUR HONOR, IF I  
23 MAY INTERRUPT YOU. AND I KNOW I DO THAT AT GREAT  
24 RISK --

25 THE COURT: COUNSEL, NOTHING IS GOING TO

1           HAPPEN TO YOU, I ASSURE YOU.

2           MR. FOREMAN: THAT'S A KEY POINT. THAT'S  
3 EXACTLY RIGHT; HE GETS A COOKIE. WE ALL AGREE HE  
4 GETS A COOKIE. THE KEY POINT IS THEY SAY SOME OF  
5 THEM GET A COOKIE WITHOUT CLICKING ON SOMETHING.

6           NOW, WHERE IN THEIR FIRST AMENDED  
7 COMPLAINT DO THEY SAY THAT THAT'S A REQUIREMENT OF  
8 ANYTHING? AND THAT'S THE HEART OF THE PROBLEM ALSO  
9 WITH THEIR RICO CLAIM. WHERE DID OUR CLIENTS EVER  
10 ALLEGE TO HAVE PROMISED OR REPRESENTED THAT ONLY  
11 CLICKED USERS WOULD GO TO EBAY TO EARN US A  
12 COMMISSION? IT'S NOWHERE.

13           AND THAT'S WHY THIS COMPLAINT FAILS UNDER  
14 THE COMPUTER FRAUD AND ABUSE ACT, IN SECTION 502,  
15 AND RICO, AND ULTIMATELY ON WHY YOU DON'T HAVE  
16 JURISDICTION, YOUR HONOR.

17           THE COURT: THERE'S MISSING LINKS. OKAY  
18 THANK YOU VERY MUCH.

19           MR. FOREMAN: THANK YOU FOR YOUR  
20 PATIENCE, YOUR HONOR.

21           THE COURT: ANYTHING ELSE, COUNSEL,  
22 BEFORE I HEAR FROM EBAY?

23           MR. CAMPBELL: THANK YOU, YOUR HONOR.

24           WITH RESPECT TO MR. HOGAN AND DIGITAL  
25 POINT SOLUTIONS, INC., AS A PRELIMINARY MATTER IT

1           WOULD HAVE BEEN REFERRED AS THE KFC DEFENDANTS WHO  
2           BOTH MAKE EXCELLENT POINTS WITH RESPECT TO VENUE  
3           AND SUBSTANTIVE DEFECTS IN FEDERAL CAUSES OF  
4           ACTION.

5           WE'RE LOOKING AT A MORE FUNDAMENTAL FLAW  
6           WITH RESPECT TO MY CLIENT; THAT IS, I DID HEAR THE  
7           COURT ADDRESS, IN ITS TENTATIVE, ONE ISSUE WITH  
8           RESPECT TO THERE'S A QUESTION OF FACT AS TO THE  
9           EXISTENCE OF DIGITAL POINT SOLUTIONS, INC. WHAT  
10          THAT COMES DOWN TO IS REALLY THE SCOPE OF OUR  
11          REQUEST FOR JUDICIAL NOTICE AND THE EFFECT OF THE  
12          LEGAL DATE DIGITAL POINT SOLUTIONS, INC. WAS  
13          INCORPORATED.

14          AND IF YOU STOP AND THINK ABOUT THAT FOR  
15          A MOMENT, THE PLAINTIFF IS LOOKING TO RECOVER FOR A  
16          THREE-YEAR PERIOD OF FRAUD BEFORE THAT LEGAL  
17          INCORPORATION DATE. THAT'S A REMARKABLE COMPONENT  
18          OF THEIR ATTEMPT TO RECOVER. AND CRITICAL TO THAT,  
19          THEIR ALLEGATION IS THAT YOU JUST HAVE TO ACCEPT  
20          THAT WE'VE CLAIMED THE CORPORATION EXISTED AT ALL  
21          RELEVANT TIMES AND DID SOME WRONG DOING.

22          BUT AT A MINIMUM, I THINK TO ACCESS THAT  
23          REMARKABLE AMOUNT OF RECOVERY FOR THAT THREE-YEAR  
24          PERIOD, THEY WOULD HAVE TO ALLEGE SOME FACTUAL  
25          BASIS FOR A THEORY OF PRE-INCORPORATION LIABILITY.

1                   THE COURT: THERE IS SOME TIME IN THE  
2 RELEVANT PERIOD THAT'S AFTER INCORPORATION,  
3 CORRECT?

4                   MR. CAMPBELL: THERE IS A BRIEF SIX-WEEK  
5 PERIOD AT THE END OF THE THREE AND A HALF YEARS.

6                   THE COURT: AND ON A 12(B)(6) MOTION, THE  
7 COURT DOESN'T PARSE WITH THAT CLOSELY.

8                   MR. CAMPBELL: WELL, THERE'S STILL NO  
9 NEXUS BETWEEN DIGITAL SOLUTIONS, INC. AND THE  
10 ALLEGED FRAUDULENT ACTIVITY.

11                  THEY HAVE ALLEGED INVOLVEMENT WITH  
12 MR. HOGAN AS TO USER AGREEMENTS AND SO FORTH. THEY  
13 ALLEGED THAT THE CORPORATION HAS -- THIS IS IN  
14 THEIR BRIEFS -- THE CORPORATION HAS AFFIRMATIVELY  
15 HELD ITSELF OUT AS A SEPARATE ENTITY.

16                  THOSE ARE MATTERS THAT ARE NOT WITHIN  
17 DEFENDANT'S EXCLUSIVE CONTROL, THOSE ARE BASED ON  
18 REPRESENTATIONS THAT HAVE BEEN MADE, ALLEGEDLY, TO  
19 THE PLAINTIFF.

20                  THE COURT: AGAIN, THIS IS A 12(B)(6)  
21 MOTION, AND AT A MINIMUM THE CORPORATION HELD  
22 ITSELF OUT AS A SEPARATE ENTITY, WHETHER THAT'S  
23 TRUE OR NOT IS ANOTHER DAY.

24                  AND EVEN ACCEPTING THAT THE INCORPORATION  
25 IS TO BE ACCORDED FULL FAITH AND CREDIT, YOU STILL

1 HAVE SIX WEEKS OF ALLEGED FRAUDULENT ACTIVITY AFTER  
2 THAT INCORPORATION OCCURS. SO THAT AT LEAST STATES  
3 THE CLAIM, MAYBE NOT AS VAGUE AS A CLAIM AS YOU  
4 WANT, BUT IT STATES A CLAIM.

5 MR. CAMPBELL: I THINK THE CONCERN IS THE  
6 NOTION THEY ALLEGED THE CORPORATION HELD ITSELF OUT  
7 AS A SEPARATE ENTITY, THAT'S NOT IN THE COMPLAINT,  
8 IT'S IN THE BRIEFING. AND SO THE FACT AS TO HOW IT  
9 HELD ITSELF OUT NEED TO BE IN THE COMPLAINT SO WE  
10 CAN HAVE AN ADEQUATE OPPORTUNITY TO RESPOND.

11 THE COURT: SO YOU ARE ECHOING WHAT YOUR  
12 COLLEAGUES HAVE SAID, AS TO THE SUBSTANCE OF THESE  
13 CLAIMS THERE NEEDS TO BE MORE PARTICULARITY.

14 MR. CAMPBELL: AND SPECIFICALLY WITH  
15 RESPECT TO RICO, THE ENTERPRISE COMPONENT, THERE IS  
16 A DISTINCTIVE PRINCIPAL WHERE THE RICO DEFENDANT  
17 CANNOT BE IDENTICAL TO THE RICO --

18 THE COURT: UNDERSTOOD.

19 MR. CAMPBELL: AND I WON'T GO BACK OVER  
20 THE BRIEFS, BUT THAT SEPARATENESS IS CREATED BY THE  
21 AFFIRMATIVE ACT OF INCORPORATOR. THAT IS WHAT  
22 CONFERS THE SEPARATE BENEFITS, PROTECTIONS RIGHTS  
23 TO SUE, RIGHTS TO BE SUED, THAT ALLOWS FOR THE  
24 ENTERPRISE TO BE --

25 THE COURT: WELL, THAT'S NOT THE ONLY

1 KIND OF ENTERPRISE THAT RICO RECOGNIZES. A  
2 CORPORATION IS ONE ENTERPRISE, IT'S NOT THE ONLY  
3 KIND.

4 MR. CAMPBELL: BUT THE CORPORATION IS THE  
5 ONLY KIND THEY'VE ALLEGED HERE OTHER THAN THE  
6 ASSOCIATION, IN FACT WHICH I THINK WE BRIEFED VERY  
7 WELL, CANNOT BE PREDICATED ON JUST THE DEFENDANT  
8 AND DOE'S 1 THROUGH 10. YOU CANNOT TACK ON  
9 FABRICATED DEFENDANTS IN THAT WAY TO CIRCUMVENT.

10 THE COURT: YOU NEED A LITTLE MORE. IT'S  
11 NOT JUST A LITTLE MORE, YOU NEED SPECIFICITY AS TO  
12 THE NATURE AND STRUCTURE OF THE ENTERPRISE.

13 MR. CAMPBELL: CORRECT. AND WE WOULD  
14 SUBMIT THAT.

15 THE COURT: THANK YOU.

16 A LOT FOR EBAY TO RESPOND TO. GO AHEAD,  
17 COUNSEL.

18 MR. EBERHART: YES, YOUR HONOR.  
19 FIRST, LET ME ADDRESS WHAT I THINK ARE SOME  
20 MISTAKEN UNDERSTANDINGS ABOUT WHAT WE'VE ALLEGED  
21 REGARDING THE COOKIE STUFFING SCHEME.

22 THE SCHEME INVOLVES, AS THE COURT HAS  
23 APTLY PUT IT, UNWITTING USERS WHO ARE USED BY THE  
24 DEFENDANTS IN THIS SCHEME. SO YOU COULD THINK OF  
25 IT AS A PARKED CAR. THE DEFENDANTS ARE RUNNING

1 INTO THE PARKED CAR AND THAT CAR IS HITTING EBAY.  
2 THAT PARKED CAR, THAT USER, ISN'T DOING  
3 ANYTHING. WHAT IS HAPPENING IS THAT THE DEFENDANTS  
4 ARE CAUSING THESE THIRD-PARTY USERS' COMPUTERS TO  
5 ACCESS EBAY'S SITE. AND IT IS AT THAT MOMENT THAT  
6 THE UNLAWFUL ACCESS OCCURS. IT IS THAT FORCING OF  
7 A CLICK OR THE SIMULATION OR FALSIFICATION OF A  
8 CLICK THAT CAUSES THE WRONGFUL ACCESS.

9 AND WHAT WE'VE ALLEGED IS THAT THE USER  
10 AGREEMENTS THAT GOVERN THE ACTIONS OF THESE  
11 DEFENDANTS ARE THE ONLY BASIS ON WHICH THEY HAD THE  
12 RIGHT TO ACCESS EBAY'S SITE. AND BY DOING WHAT  
13 THEY DID, THEY VIOLATED THOSE USER AGREEMENTS.

14 NOW, THAT VIOLATION TAKES PLACE BEFORE  
15 ANY PART OF THIS AFFILIATE MARKETING PROGRAM COMES  
16 INTO PLACE. NOTHING HAPPENS UNDER THAT AGREEMENT  
17 BETWEEN THE DEFENDANTS AND COMMISSION JUNCTION.  
18 THE CFAA VIOLATION IS COMPLETE AT THE MOMENT THAT  
19 THEY MAKE THEIR UNAUTHORIZED ACCESS AND IMPAIR THE  
20 DATA WHICH BELONGS TO EBAY BY DOING THE COOKIE  
21 STUFFING.

22 NOW, THEY'VE ARGUED THAT THE TERMS AND  
23 CONDITIONS THAT THEY'VE ATTACHED TO THEIR BRIEFING  
24 ARE SORT OF SUBSUMED USER AGREEMENTS, THE EBAY USER  
25 AGREEMENT WE'VE ALLEGED GOVERNS THE ACTIONS OF

1 THESE DEFENDANTS.

2 THAT'S SIMPLY NOT TRUE. THOSE ARE TERMS  
3 AND CONDITIONS THAT ARE RELATED TO THE AFFILIATE  
4 MARKETING PROGRAM THAT THEY HAVE WITH COMMISSION  
5 JUNCTION. THOSE ARE NOT TERMS AND CONDITIONS THAT  
6 PURPORT TO MODIFYING EBAY'S USER AGREEMENT. AND  
7 STRIKINGLY, THERE IS NOTHING IN EITHER THAT  
8 AGREEMENT THEY'VE ATTACHED WITH COMMISSION JUNCTION  
9 OR IN THE SUPPLEMENTAL TERMS AND CONDITIONS THAT  
10 GIVES THEM ANY RIGHT TO ACCESS EBAY'S SITE.

11 WHY IS THAT? WELL THAT'S BECAUSE, AS  
12 COUNSEL PUT IT, THEY'RE SUPPOSED TO BE IN THE  
13 BACKGROUND. THEY ARE NOT SUPPOSED TO BE ACCESSING  
14 EBAY'S SITE. THEY ARE SUPPOSED TO BE PLACING ADS  
15 THAT USER'S AFFIRMATIVELY CLICK ON AND THE USERS GO  
16 TO EBAY.

17 THE DEFENDANTS AREN'T SUPPOSED TO BE  
18 ACCESSING EBAY'S SITE AS PART OF THE AFFILIATE  
19 MARKETING PROGRAM, AND IT DOESN'T GIVE THEM ANY  
20 RIGHT TO ACCESS EBAY'S SITE. SO IT IS PRECISELY  
21 THE USER AGREEMENT THAT ARE AT ISSUE WHEN THEY  
22 IMPROPERLY ACCESS EBAY'S WEBSITE.

23 THEY'VE ALSO ARGUED IT'S EBAY'S BURDEN TO  
24 PROVE THAT THE FORUM SELECTION CLAUSE DOES NOT  
25 APPLY. THAT'S SIMPLY NOT THE LAW. THEY ARE

1 ATTEMPTING TO IMPOSE A FORUM SELECTION CLAUSE FROM  
2 A CONTRACT TO WHICH EBAY IS NOT THE PARTY AND  
3 THEY --

4 THE COURT: LET'S ASSUME THAT'S RIGHT,  
5 AND I THINK IT IS. WHY IS EBAY NOT -- EBAY IS NOT  
6 A PARTY TO THAT AGREEMENT, BUT WHY IS EBAY NOT  
7 BOUND BY IT BECAUSE OF THE CLOSE RELATIONSHIP AND  
8 THIRD-PARTY BENEFICIARY?

9 MR. EBERHART: BECAUSE THERE IS A -- THE  
10 INITIAL VIOLATION UNDER THE USER AGREEMENT WHICH  
11 HAS ITS OWN FORUM SELECTION CLAUSE WHICH PROVIDES  
12 THE FORUM IS TO BE HERE IN THE NORTHERN DISTRICT OF  
13 CALIFORNIA --

14 THE COURT: THE HARM IS WHEN THE PARKED  
15 CAR CRASHES INTO EBAY.

16 MR. EBERHART: NO. UNDER CFAA -- THAT'S  
17 RIGHT. SO THE HARM OCCURS WHEN THE COOKIE STUFFING  
18 OCCURS. THE CFAA CLAIM IS COMPLETE AT THAT MOMENT  
19 BECAUSE EBAY'S DATA HAS BEEN IMPAIRED AS OF THAT  
20 TIME.

21 SO OUR ARGUMENT IS THAT THE USER  
22 AGREEMENT, WHICH GOVERNS THAT ACCESS WHICH IS  
23 ESSENTIAL TO OUR CLAIM, IS THE FIRST VIOLATED  
24 CONTRACT, IF YOU WILL, EVEN ASSUMING THIS  
25 THIRD-PARTY CONTRACT BINDS EBAY. AND SO THAT FIRST

1 VIOLATED CONTRACT, THE FORUM SELECTION CLAUSE OUGHT  
2 TO GOVERN IN THIS CASE.

3 THE COURT: SO YOU NEVER GET TO THE  
4 QUESTION OF WHETHER A DISPUTE AS TO THE OTHER  
5 AGREEMENT IS THE ONE THAT WOULD IMPROPERLY VENUE IN  
6 SOUTHERN CALIFORNIA EVEN IF EBAY WERE NOT A  
7 SIGNATORY; YOU NEVER GET THERE.

8 MR. EBERHART: CORRECT.

9 THE COURT: DO YOU WANT TO ADDRESS ON THE  
10 RICO ISSUE, THE ISSUE ABOUT WHETHER THERE OUGHT TO  
11 BE MORE SPECIFICITY ABOUT THE ENTERPRISE GIVEN THE  
12 DATA INCORPORATION?

13 MR. EBERHART: SURE, YOUR HONOR.  
14 THERE'S AN ADDITIONAL STRIKING FACT ABOUT THE RICO  
15 CLAIMS WHICH -- NEITHER IN THE OPENING BRIEFS NOR  
16 IN THE REPLIES DO ANY OF THE DEFENDANTS CHALLENGE  
17 THE COMMON LAW FRAUD CLAIM.

18 THEY MAKE A LOT OF ARGUMENTS ABOUT  
19 FAILURE TO PLEAD OUR RICO CLAIMS WITH SPECIFICITY,  
20 BUT IT'S THE EXACT SAME BEHAVIOR WE'VE COMPLAINED  
21 OF IN OUR COMMON LAW FRAUD CAUSE OF ACTION.

22 AND BY CONCEDING THAT THAT'S PROPERLY  
23 PLEAD, I THINK THEY HAVE CONCEDED THAT THE  
24 PREDICATE ACTS UNDER RICO ARE PROPER.

25 THE COURT: I DON'T THINK THEY ARE

1 ARGUING THAT, AT LEAST THAT'S WHAT I HEARD.

2 MR. EBERHART: NOW, WITH RESPECT TO THE  
3 DPS ALLEGATIONS, THEIR ARGUMENT IS THAT WE'VE ONLY  
4 PLED AN ASSOCIATION IN FACT BY COMBINING MR. HOGAN  
5 WITH THE DOE'S.

6 THAT'S NOT THE CASE. WE'VE PLED OUR  
7 ASSOCIATION IN FACT, INCLUDING MR. HOGAN AND THE  
8 DOE'S AND DPS, INC. NOW, THE FACT THAT THEY CLAIM  
9 DPS, INC. DID NOT EXIST BEFORE MAY OF 2007, I THINK  
10 WE'VE ADEQUATELY ADDRESSED THAT, AND I THINK THE  
11 CASES SUPPORT THE NOTION, CANNOT BE JUDICIALLY  
12 NOTICED.

13 THE FACT OF THE FILING DOES NOT PROVE  
14 THAT DPS, INC. DID NOT EXIST BEFORE MAY OF 2007.  
15 SO REQUIRING EBAY TO -- I'M NOT SURE HOW WITHOUT  
16 DISCOVERY -- FIND OUT WHAT OTHER ENTITIES MR. HOGAN  
17 POSSESSED PRIOR TO MAY 2007, EVEN ASSUMING THERE  
18 WASN'T SOME DPS, INC. BEFORE MAY 2007, IS SIMPLY  
19 NOT A MOTION TO DISMISS ISSUE.

20 IT'S A SUMMARY JUDGEMENT ISSUE AFTER  
21 DISCOVERY BECAUSE IT MAY WELL BE MR. HOGAN HAD  
22 ANOTHER DIGITAL POINT SOLUTIONS, INC. THAT HE  
23 DISSOLVED.

24 THE COURT: YOU ARE SAYING YOU CAN'T RULE  
25 OUT THE POSSIBILITY. AND THE MERE FACT THAT YOU

1 HAVE THE CORPORATE FILING DOES NOT RULE OUT ANY  
2 OTHER POSSIBILITIES.

3 MR. EBERHART: THAT'S CORRECT,  
4 YOUR HONOR.

5 THE COURT: OKAY. THANK YOU.

6 I THINK I'VE GOT ENOUGH TO CHEW ON FOR A  
7 WHILE. I WILL GET A RULING OUT AS SOON AS  
8 POSSIBLE.

9 YES?

10 MR. PRESIADO: IF I COULD BE HEARD ON ONE  
11 LAST POINT.

12 THE COURT: BRIEFLY.

13 MR. PRESIADO: YES, I WILL MAKE IT BRIEF.  
14 I DON'T THINK THEY DENIED THAT REGARDLESS OF THE  
15 TIMING ON THE COOKIE STUFFING SCHEME THAT IT ONLY  
16 MATTERS IF WE ALLEGEDLY COOKIE STUFFED BECAUSE OF  
17 THE PAYMENTS THEY MADE TO US, AND THAT DIRECTLY  
18 RELATES TO THE PSA.

19 IF THEY DIDN'T MAKE ANY PAYMENTS TO US,  
20 HAD NO OBLIGATIONS TO US AND THERE WAS THIS COOKIE  
21 STUFFING THING GOING ON, IT WOULDN'T MATTER.

22 THE COURT: THERE WOULDN'T BE ANY  
23 DAMAGES. IT WOULD STILL BE IMPROPER.

24 MR. PRESIADO: WELL, I DON'T KNOW. WE  
25 ARGUE THAT IT WOULDN'T.

1                   THE COURT: SO IT'S OKAY TO STUFF COOKIES  
2                   AS LONG AS YOU DON'T GET PAID FOR IT?

3                   MR. PRESIADO: NO, I'M TALKING ABOUT  
4                   VENUE HERE, YOUR HONOR.

5                   THE COURT: I KNOW YOU ARE. MY QUESTION  
6                   IS NOT MEANT TO BE A SILLY ONE.

7                   IF YOU'RE MESSING WITH PEOPLE'S DATA,  
8                   EVEN IF IT'S NOT IN ORDER TO DERIVE BENEFIT FROM  
9                   ANOTHER CONTRACT, ISN'T THAT IN AND OF ITSELF A  
10                  WRONGFUL ACT?

11                  MR. PRESIADO: WELL, THEY CONCEDE THEY  
12                  COOKIE STUFF USERS THAT GO ON THEIR SITE FOR THE  
13                  FIRST TIME WITHOUT SIGNING A USER AGREEMENT.

14                  THE COURT: SO THE DAMAGE ELEMENT FLOWING  
15                  FROM THE COOKIE STUFFING WOULDN'T EXIST BUT FOR THE  
16                  PSA.

17                  MR. PRESIADO: RIGHT.

18                  THE COURT: AND THAT GETS YOU BACK TO THE  
19                  FORUM SELECTION CLAUSE.

20                  MR. PRESIADO: RIGHT.

21                  AND YOUR HONOR, I WOULD REQUEST -- AND I  
22                  THINK WE'VE MADE ENOUGH OF AN ARGUMENT WITH RESPECT  
23                  TO PSA AND THE VENUE ISSUE AND FORUM SELECTION  
24                  CLAUSE; THAT AT THE VERY LEAST, THERE SHOULD BE A  
25                  CONTINUANCE OR AN ADVANCE OF THE CASE FOR THE

1 LIMITED DISCOVERY OF THE AGENCY RELATIONSHIP, THEIR  
2 CONNECTION TO THE PSA, ET CETERA, TO BE ABLE TO  
3 COME BACK WITH FACTS ESTABLISHING, TO THE EXTENT  
4 THE COURT ISN'T SATISFIED HERE, ESTABLISHING THE  
5 AGENCY AND THEIR OBLIGATIONS --

6 THE COURT: I DON'T THINK THAT'S MY  
7 ISSUE. I ACTUALLY THINK IF THIS CASE WERE ABOUT  
8 THE PSA, THAT YOUR VENUE ARGUMENT WOULD BE PRETTY  
9 STRONG. BUT AT LEAST THE WAY I'VE BEEN LOOKING AT  
10 IT UP UNTIL NOW, IT SEEMS TO ME WHAT IT'S ABOUT IS  
11 THE COOKIE STUFFING.

12 YOU ARE SAYING THEY CAN'T MAKE AN  
13 ESSENTIAL ELEMENT OF THE CFAA CLAIM WITHOUT  
14 INVOKING RIGHTS UNDER THE PSA, SO IT GETS YOU BACK  
15 TO THAT STARTING POINT.

16 MR. PRESIADO: RIGHT, YOUR HONOR.  
17 AND THAT'S WHY THEY DON'T BRING BREACH OF  
18 CONTRACT CLAIM, WHICH WOULD BE THE SAME DAMAGES --

19 THE COURT: I UNDERSTAND.

20 I'M GOING TO GIVE IT THOUGHT, AND I WILL  
21 ASK COUNSEL TO SPEND 30 SECONDS RESPONDING TO THAT.

22 \*MR. FOREMAN: JUST BRIEFLY, YOUR HONOR.  
23 QUICKLY, ON THIS FAILURE TO STATE THE  
24 FRAUD CLAIM, WE'RE CHALLENGING THIS COURT'S  
25 JURISDICTION. WE DIDN'T CONCEDE ANYTHING ABOUT

1 FRAUD, SO THAT'S WHY WE DIDN'T ADDRESS THE COMMON  
2 LAW FRAUD CLAIM.

3 ON THIS USER AGREEMENT, COUNSEL FOR  
4 PLAINTIFF MADE A VERY CRITICAL ADMISSION ON BEHALF  
5 OF HIS CLIENT THAT I JUST THINK WE NEED TO PAY  
6 ATTENTION TO. HE SAID IN HIS ARGUMENT THAT THE  
7 MOMENT THE UNLAWFUL ACT OCCURS, AT THE CONNECTION  
8 BETWEEN THE AD THAT OUR CLIENT PRODUCED AND THE  
9 USER IN THE INTERNET LOOKING AT IT AND GETTING A  
10 COOKIE.

11 SO THERE'S TWO IMPORTANT THINGS THERE,  
12 YOUR HONOR. THAT'S WHEN THE ALLEGED COOKIE  
13 STUFFING OCCURS, NOT WHEN THEY GO TO EBAY. AND  
14 IT'S VERY IMPORTANT --

15 THE COURT: THEY GET TO EBAY BY CLICKING  
16 ON THE AD, RIGHT?

17 MR. FOREMAN: OR THEY ALLEGE BY NOT  
18 CLICKING. CERTAINLY, IF THEY CLICK ON THE AD IT  
19 TAKES THEM TO EBAY, THEN THEY ALREADY HAVE OUR  
20 COOKIE AND HE EBAY GIVES THEM A COOKIE.

21 AND THAT'S WHERE, AGAIN, THIS ANALOGY OF  
22 THE BUMP CARS REALLY BREAKS DOWN. THE INTERNET  
23 USER IS THE ONE THAT GOES TO EBAY.

24 THE COURT: BUT HE OR SHE IS CARRYING --  
25 MR. FOREMAN: CARRYING COOKIES, THERE'S

1                   NOTHING ILLEGAL OR IMPROPER. WE ALL GET THEM ALL  
2                   THE TIME. THERE ARE CASES THAT HAVE ORIGINALLY  
3                   CHALLENGED COOKIES AS BEING UNLAWFUL UNDER THE  
4                   CFAA, AND ALL OF THOSE CASES FOUND COOKIES DO NO  
5                   HARM, THEY ARE PERFECTLY OKAY IN THE INTERNET THESE  
6                   DAYS.

7                   THE COURT: UNLESS THEY ARE TIED TO --

8                   MR. FOREMAN: IF SOMETHING ELSE HAPPENS.

9                   THE COURT: WHICH IS WHERE YOU GET TO THE  
10                  PSA.

11                  MR. FOREMAN: THAT'S WHY BY PUTTING A  
12                  COOKIE ON AN INTERNET USER COMPUTER WHEN THEY SEE  
13                  YOUR ADD IS NOT A PROBLEM.

14                  THE COURT: WHAT MAKES IT WRONG IS  
15                  BECAUSE YOUR CLIENTS ARE ALLEGEDLY GETTING PAID FOR  
16                  SOMETHING THEY'RE NOT SUPPOSED TO.

17                  MR. FOREMAN: AND THAT'S WHY THIS CASE IS  
18                  JUST ABOUT A BREACH OF CONTRACT UNDER THE  
19                  AFFILIATED MARKETING.

20                  TO THE EXTENT THEY WANT TO GO BACK TO  
21                  THIS USER AGREEMENT, THEIR FIRST AMENDED COMPLAINT  
22                  PAGE 9, PARAGRAPH 3, 5 LINES 4 AND 5 ALLEGES THE  
23                  USER AGREEMENTS ACCEPTED BY EACH OF THE DEFENDANTS  
24                  SHAWN HOGAN, BRIAN DUNNING AND TODD DUNNING ARE  
25                  ESSENTIALLY SIMILAR.

1 SO YOUR HONOR, ALL THESE OTHER CORPORATE  
2 DEFENDANTS SHOULD BE DISMISSED. IF THIS WHOLE CASE  
3 IS BASED ON THE USER AGREEMENTS, AS THEY'RE ARGUING  
4 NOW, NONE OF THE OTHER PARTIES SIGNED THEM.

5 THE COURT: WHAT I HEARD HIM SAY WAS THAT  
6 HE WAS TALKING ABOUT THE USER AGREEMENTS OF THE  
7 PEOPLE WHO REGISTER ON EBAY, THE INNOCENT THIRD  
8 PARTIES WHO CARRY THE COOKIES; I THINK THAT'S WHAT  
9 I HEARD; BUT I UNDERSTAND.

10 MR. FOREMAN: OKAY. THANK YOU,  
11 YOUR HONOR.

12 MR. CAMPBELL: THANK YOU, YOUR HONOR.

13 JUST A COUPLE CORRECTIONS. COUNSEL FOR  
14 EBAY INDICATED THAT NO ONE HAD CHALLENGED THE  
15 COMMON LAW FRAUD CLAIM FOR LACK OF SPECIFICITY OR  
16 PARTICULARITY. THAT'S NOT TRUE; WE DID CHALLENGE  
17 THAT AS WELL.

18 THE COURT: OKAY.

19 MR. CAMPBELL: AND SECONDLY, THE POSITION  
20 THAT THEY'RE TAKING IS: WELL, WE CAN'T KNOW THE --  
21 WHAT THE EXISTENCE OF THE ENTITY IS PRIOR TO THE  
22 DATE OF INCORPORATION WITHOUT DISCOVERY. BUT  
23 AGAIN, THEIR BRIEFS REPRESENT THAT THE CORPORATION  
24 HELD ITSELF OUT AS A SEPARATE ENTITY. SO THOSE ARE  
25 THE EXACT KINDS OF REPRESENTATIONS, FACTUAL

1 INFORMATION, THAT NEEDS TO BE IN AN AMENDED  
2 PLEADING.

3 BRIEFLY, ALSO, WITH RESPECT TO RICO, NO  
4 INSPECTOR IN THE FIRST AMENDED COMPLAINT DOES IT  
5 ALLEGES THAT THE CORPORATION IS PART OF THE HOGAN  
6 GROUP. THAT IS NOT TRUE. THAT IS CLEARLY ABSENT  
7 FROM THE FIRST AMENDED COMPLAINT.

8 AND AS AN EXTENSION OF THAT, AT A  
9 MINIMUM, THE RICO CLAIM AS TO DIGITAL POINT  
10 SOLUTIONS, INC. WOULD HAVE TO BE DISMISSED BECAUSE  
11 IT'S NOT ALLEGED AS A RICO DEFENDANT. IT COULDN'T  
12 BE BECAUSE THEY'RE EXPRESSLY ALLEGING IT'S THE RICO  
13 ENTERPRISE.

14 SO THAT WAS ADDRESSED IN OUR RELY, NOTING  
15 THEY HADN'T RAISED THAT ISSUE OR RESPONDED TO THAT  
16 ISSUE IN THEIR OPPOSITION.

17 THE COURT: OKAY.

18 MR. EBERHART: QUICKLY, YOUR HONOR.

19 FIRST OF ALL, PARAGRAPH 43 OF THE FIRST  
20 AMENDED COMPLAINT ALLEGES THAT DPS, INC. WAS PART  
21 OF THE ASSOCIATION IN FACT.

22 DPS, INC. HAS ONLY CHALLENGED COMMON LAW  
23 FRAUD CLAIM ON THE BASIS THAT THEY DID NOT EXIST  
24 BEFORE MAY 2007. THEY HAVE NOT OTHERWISE  
25 CHALLENGED THAT COMMON LAW FRAUD CLAIM IN ANY OTHER

1 WAY.

2 THE COURT: OKAY.

3 MR. EBERHART: WITH RESPECT TO THE CFAA  
4 CLAIM, THE DAMAGE ABSOLUTELY EXISTS WHETHER OR NOT  
5 MONIES WERE PAID TO THE DEFENDANTS. THE CFAA  
6 RECOGNIZES, AS THE COURT I BELIEVE HAS POINTED OUT,  
7 THAT IMPAIRMENT OF DATA IS DAMAGE UNDER THE CFAA.

8 AT THE MOMENT OF THE COOKIE STUFFING  
9 EBAY'S DATA WAS IMPAIRED BECAUSE EBAY WAS NOW  
10 SEEING DATA THAT SAID, GHEE, THESE USERS WERE  
11 REFERRED BY THESE DEFENDANTS, BUT THAT WASN'T TRUE,  
12 THAT WAS FALSE. AND EBAY HAD TO LATER TAKE STEPS  
13 TO RESPOND TO THIS PROBLEM WHICH IS LOSS UNDER THE  
14 CFAA.

15 SO EVEN IF YOU DIDN'T HAVE PAYMENTS TO  
16 THESE DEFENDANTS --

17 THE COURT: I THOUGHT THAT'S WHAT YOUR  
18 ARGUMENT WAS, BUT I JUST WANTED TO MAKE SURE.

19 MR. EBERHART: AND I JUST WANTED TO  
20 CORRECT ONE FINAL FACTUAL THING.

21 THE USERS DO NOT RECEIVE COOKIES FROM  
22 THESE DEFENDANTS. THE COOKIES CAN ONLY COME FROM  
23 EBAY, SO THAT IS WHY THEY HAD TO FORCE THE USERS ON  
24 TO EBAY'S SITE TO GET THE COOKIE. AND THAT IS PLED  
25 IN PARAGRAPHS 24 THROUGH 27 IN OUR FIRST AMENDED

1 COMPLAINT, YOUR HONOR.

2 THE COURT: YOU KNOW WHAT, THIS HAS TO  
3 STOP. YOU'VE BEEN GOING FOR HALF AN HOUR. I DON'T  
4 THINK ANYBODY IS GOING TO SAY ANYTHING NEW.

5 MR. PRESIADO: ONE SENTENCE.

6 THE COURT: IT BETTER BE NEW OR ELSE I  
7 DON'T WANT TO HEAR IT.

8 MR. PRESIADO: OKAY.

9 THE FACT IS THEY DO ALLEGE MONETARY  
10 DAMAGE. TO THE EXTENT THEY DO, THEN IT TIES INTO  
11 THE PSA --

12 THE COURT: BUT JURISDICTIONAL ELEMENT IS  
13 THAT THERE BE HARM, THAT THERE BE DAMAGE. I MEAN,  
14 THERE ARE DIFFERENT KINDS OF DAMAGE, AND I THOUGHT  
15 EBAY'S ARGUMENT WAS THAT THERE WAS DAMAGE IN  
16 ADDITION TO THE LOSS OF REVENUE.

17 MR. PRESIADO: RIGHT. BUT TO THE EXTENT  
18 THERE IS DAMAGE, THEY SAY, IN LOSS OF REVENUE, THEN  
19 THAT'S PART OF THEIR CLAIM, THAT TIES IN THE PSA.  
20 IF THEY'RE GOING TO SAY THEY ARE NOT SEEKING ANY  
21 DAMAGES, MONETARY DAMAGES --

22 THE COURT: I NEED TO THINK ABOUT THAT  
23 PIECE BECAUSE THERE IS A 1404 ARGUMENT THAT ISN'T  
24 BEFORE ME THAT I THINK POSSIBLY COULD BE MADE.

25 I'M NOT INVITING MORE MOTIONS, BUT

1 THERE'S AN ARGUMENT THAT THERE MIGHT BE SOME  
2 JUDICIAL ECONOMY IN HAVING ALL OF THIS IN ONE  
3 PLACE; BUT THAT'S ACTUALLY NOT WHAT I'M BEING ASKED  
4 TO DEAL WITH TODAY. ALL RIGHT.

5 MATTER SUBMITTED.

6 THANK YOU VERY MUCH.

7 (WHEREUPON, THE PROCEEDINGS IN THIS  
8 MATTER WERE CONCLUDED.)

1 STATE OF CALIFORNIA )

2 ) SS:

3 COUNTY OF SANTA CLARA )

4  
5 I, THE UNDERSIGNED OFFICIAL COURT  
6 REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
7 THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
8 FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
9 CERTIFY:

10 THAT THE FOREGOING TRANSCRIPT,  
11 CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
12 CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
13 SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
14 HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
15 TRANSCRIPTION TO THE BEST OF MY ABILITY.

16  
17 {  }  
18

19 SUMMER A. CLANTON

20 OFFICIAL REPORTER, CSR NO. 13185

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22  
23  
24  
25